CONGRESS, AND THE REGULATION OF CORPORATIONS.

AMONG the powers which the Constitution vests in Congress, was one whose grant few opposed and from which no apprehensions were entertained.[1] This was "the simple power of regulating trade."[2] At a time when the powers given to Congress were "extorted from the grinding necessity of a reluctant people"[3] this power was given by "the common consent of America."[4] Persons who opposed every other means to strengthen Congress consented to this grant. "Why not," it was asked, "give Congress power only to regulate trade?"[5]

For the greater part of the first century under the Constitution, the construction placed upon the power thus granted, was such as to justify this attitude. The power was not of an absorbing nature, nor one whose possession enabled Congress to invade either the jurisdiction of the states or the personal liberty of individuals.

Recently, however, the power seems wholly to have changed its character. The right to engage in foreign and interstate commerce, it is now said, is derived solely from the federal government. All the industrial and transportation interests of the country — except a few of the smallest — are, therefore, it is said, within federal control.

This new construction of the commerce clause is advanced, not as a necessary result of explicit constitutional provisions, but, frankly, to justify specific legislation — the regulation of corporations — which the President has for some time advocated, and now again in his annual message urges upon Congress. The first popular statement of the argument by which such legislation is to be supported was made by Mr. Knox, when Attorney-General.

Admitting, apparently, as is unavoidable, that the manufacture and production of articles of commerce are within state jurisdic-

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[1] Federalist, No. 45.

[2] Speech of William Symmes in Convention of Massachusetts, 2 Elliot Deb. 70.

[3] See Von Holst, Const. Hist. 1750–1832, p. 63.

[4] Speech of Robert Livingston in Convention of New York, 2 Elliot Deb. 214.

[5] Speech of Gen. Thompson in Convention of Massachusetts, 2 Elliot Deb. 80.

tion, as is also the creation of corporations, determination of amount of capital, publicity of operation, etc., Mr. Knox argued that Congress may "deny to a corporation, whose life it cannot reach, the privilege of engaging in interstate commerce, except upon such terms as Congress may prescribe to protect that commerce from restraint. Such a regulation," he said, "would operate directly upon commerce, and only indirectly upon the instrumentalities and operations of production."[1]

In other words, then, the argument is that Congress has uncontrolled power to tax, regulate, or even to prohibit interstate commerce, and that it may use this power to accomplish results which are wholly beyond its jurisdiction.

If these two views of the Constitution represented merely the doctrines of present and opposing schools of constitutional construction, such a difference of opinion upon fundamental questions would still be unfortunate. If, however, this difference be not so much between schools as between present and past, if it mark a fundamental change in the national conception of the Constitution and in the spirit of its administration, the significance of the policy toward which the country is moving becomes apparent; for important as undoubtedly are the economic questions whose agitation has given rise to new constitutional doctrines, the preservation of the Constitution is more important still. "There is one point," Mr. Lecky said, "on which all the best observers in America, whether they admire or dislike democracy, seem agreed. It is, that it is absolutely essential to its safe working that there should be a written constitution, securing property and contract, placing serious obstacles in the way of organic changes, restricting the power of majorities, and preventing outbursts of mere temporary discontent, and mere casual coalitions from overthrowing the main pillars of the State. In America, such safeguards are largely and skilfully provided, and to this fact America mainly owes her stability."[2]

Unfortunately there seems to be a growing impatience with these very safeguards; a belief that the Constitution is not in all respects adequate to existing conditions, and that new powers

[1] Speech at Pittsburg, Oct. 14, 1902; copied in 36 Cong. Rec. 412. See also first annual report of Commissioner of Corporations; Democratic National Platform, 1904; Annual Report of Secretary Metcalf of Department of Commerce and Labor, December, 1905.

[2] Democracy and Liberty, Vol. I. p. 136.

should be assumed by and supported in the federal government.[1] The statement of this proposition is probably its best answer, for there is no general desire to question the supremacy of the Constitution, either directly or by constructions which are recognized as unsound. It is still true, as Jefferson said, that to take a single step beyond the powers which the Constitution has drawn around Congress "is to take possession of a boundless field of power no longer susceptible of any definition."[2] This congressional supremacy is not advocated on any hand, nor is it sought to impose the ultimate authority upon Congress and the Supreme Court together. Participation in such a partnership is, in a democratic government, wholly incompatible with life tenure of office and sooner or later must destroy the authority of the judiciary.

Rousseau said that popular government, more than any other, "most strongly and constantly tends to change its form, and there is no government, therefore, which demands more courage and vigilance for its maintenance."[3] It is for this reason that the Court was established, — not to permit change, but to resist unconstitutional change. The importance and difficulty of its position thus appear, for upon the Court ultimately rests the pressure of the constantly increasing demand for change, and from its members the maintenance of the Constitution demands an ever increasing courage and vigilance.

The principal evils of corporate management which it is said demand federal legislation are those which result from over-capitalization — "watering of stock" — and secrecy of operation and accounts. These matters are admittedly within state jurisdiction and beyond federal control. There is nothing new in the suggestion that Congress should undertake to legislate in this field.[4]

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[1] Even as conservative a lawyer as Judge Cooley at one time entertained this view. See "Michigan," American Commonwealth Series 346. But he later changed his opinion. See "Written and Prescriptive Constitutions," 2 HARV. L. REV. 341. On the general subject see "The Elasticity of the Constitution," by Arthur W. Machen, Jr., 14 HARV. L. REV. 200.

[2] Opinion on U. S. Bank bill.

[3] Social Contract, Book III., Ch. IV.

[4] "When the committee have been asked to remedy other evils, such as the watering of stock as a pretext of levying additional tribute upon the people, we have had to meet the friends of such propositions as that with the statement that we have no power, however much we sympathize with them, to take hold of these corporations and deal with them as such, but our powers are limited alone to the regulation of commerce among the States." John H. Reagan, of Texas, in House of Representatives, Jan. 5, 1881, Cong. Rec., 46th Cong., 3d Sess., 11 Cong. Rec., Part I. p. 364.

The novel feature about the present situation is that responsible officers of government now urge Congress indirectly to assume control of these matters by denying or taxing interstate transportation to all corporations failing to conform to such standards as Congress may establish.

In considering the constitutionality of this legislation it is necessary first to review the history of the development of federal power under the commerce clause. Congress has extended its commercial powers into fields over which the framers of the Constitution did not intend that it should have jurisdiction. This new jurisdiction being taken, not granted, the question of its extent can be determined only by reference to the power originally granted and the history of its development. Otherwise, unless limitations upon Congress, imposed under different conditions, may, in a sense by accident, be found to operate in these new fields, the powers of Congress with every assumption of jurisdiction would be unrestricted.

It is therefore proposed briefly to trace the growth of federal power over commerce with relation to the questions involved in the current proposals for trust regulation; and having thus shown the extent of the jurisdiction, it is intended to take up two express limitations upon the federal power: first, the provision securing liberty for every person, and second, the provision that Congress shall not tax articles exported from any state.

The Nature and Extent of the Federal Power.

The provision of the Constitution which compels the courts to distinguish between interstate commerce and that commerce which is domestic within each state presents the problem of projecting a physical boundary line as an economic distinction. In fact, however, there is no economic distinction which even roughly corresponds with state boundaries. Commerce is a whole, and a power to regulate commerce, if complete and unlimited by an arbitrary line of division, must extend to all commerce, wherever conducted. Such a complete power Congress does not possess. The Constitution in fact establishes an arbitrary limit to federal jurisdiction.

A distinction of this nature, however, clear as it may at first be made, is difficult to observe. Courts proceed so largely by logical processes, seeking to create a consistent and harmonious body of decisions, that an arbitrary distinction, undiscoverable by logic, inevitably tends to blur. In the course of time, then, and under

changing conditions, federal powers have undergone a development which must now be accepted as a fact. To understand the existing federal power it is necessary, therefore, to define the original grant of authority, and then to follow the history of its development.

In thus examining the federal power over commerce two facts conspicuously appear: first, that the constitutional grant was not a broad, general jurisdiction, but was a definite authority to accomplish specific purposes; and second, that the development of this power has not been such as to enable Congress to interfere with free transportation, but rather, of a character to secure freedom of transportation, even as against impediments which could not have been foreseen when the Constitution was formed.

The commerce clause seems now popularly to be understood to give Congress such power as was outlined by Randolph in the sixth resolution submitted to the Convention on May 29, 1787. It was then proposed that Congress should be empowered "to legislate in all cases in which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

It is clear, however, that the Convention did not at any stage of its debates contemplate the grant to the federal government of an undefined jurisdiction. Upon this subject there was no division of opinion. Charles Pinckney and John Rutledge objected to the vagueness of the resolution, saying that "they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition." In this Pierce Butler agreed, and Randolph himself "disclaimed any intention to give indefinite powers to the national legislature, declaring that he was opposed to such an inroad on the state jurisdictions."[1]

The Convention therefore by common consent proceeded to enumerate all cases in which jurisdiction should be given to Congress, so that, as stated in Massachusetts, only "a well guarded power to regulate trade shall be entrusted to Congress."[2]

The purpose to avoid indefiniteness appears in many provisions of the completed instrument. Congress, for example, is not only given power to coin money, but specific authority is added to regulate the value thereof and of foreign coin, and to punish counterfeiting. General power is given to declare war, and specific

[1] 5 Elliot Deb. 139.

[2] Bancroft, Vol. VI. p. 141.

authority is added to grant letters of marque and reprisal, to make rules for the government of land and naval forces, and rules concerning captures on land and water. A general power is given to call forth the militia to execute the laws of the Union, and there is added specific power to suppress insurrections. Power to regulate commerce, then, was not given as an indefinite jurisdiction, but was intended as a specific authority to effect certain well understood ends.

The great purposes which it was sought by the Constitution to accomplish were four in number. It was necessary to establish a federal authority capable of raising a federal revenue, to regulate foreign relations, to prevent the imposition of duties by particular states upon articles brought from other countries, or from or through other states, and to control navigation. These four great purposes were each covered by express provision.

Power to raise a revenue from foreign commerce, implied in the commerce clause,[1] was expressly granted by the provision that Congress may impose taxes, duties, imposts, and excises, subject, however, to the restrictions that duties, imposts, and excises be uniform throughout the country, and that direct taxation be apportioned to the population. Power to control foreign relations was given by the clause which authorized the executive, with the Senate, to make treaties. The prevention of duties by particular states was accomplished by forbidding state taxation of exports and imports.

There remains, then, the commerce clause. What was its meaning? To understand this clause it is necessary to consider the situation and the methods by which commerce was conducted when the Constitution was framed.

The principal commerce at that time was conducted by sailing vessels with foreign nations. Beside this there was also a considerable coasting trade from state to state along the Atlantic seaboard. Interior communication between states had hardly begun. Such as existed was carried on by horse and wagon, and by vessels or flatboats on rivers. It was, however, to the foreign and the coasting trade that the attention of the country was directed. This trade, James Bowdoin said, was in a "miserable state" because of the want of power in Congress.[2] Other nations prohibited our vessels from entering their ports and laid heavy duties on our

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[1] Williamson, Remarks on the New Plan of Government, printed in State Gazette of North Carolina in 1788; Ford, Essays on the Constitution 393, 401.

[2] 2 Elliot Deb. 83, 106.

exports to them, and we had no way of retaliating because of the impotence of Congress.

This, then, was the commercial situation when the Constitution was formed. The "retaliating or regulating power," as Bowdoin called it, was granted by universal consent.[1] Of the meaning of this clause, there was in the early days of the Constitution no uncertainty. It included power to pass a navigation act and authorized Congress to levy duties upon foreign imports. Monroe said that

"Commerce between independent powers or communities is universally regulated by duties and imposts. It was so regulated by the States before the adoption of this Constitution, equally in respect to each other and to foreign powers. The goods and vessels employed in the trade are the only subjects of regulation. It can act on none other." [2]

Congress was authorized then to regulate foreign and coasting trade and also to regulate trade among the states. It has often been assumed that federal authority over these branches of commerce, being given in the same words and in the same clause, is coextensive. This view is, however, clearly inconsistent with the express provisions of the Constitution and with the general scheme of the instrument.[3]

The states of the Union are not known to foreign nations. So far as relates to other countries American commerce is necessarily national in character and is conducted under federal authority and protection alone.[4] In foreign relations the general government stands in the place of and represents every state for every national purpose. It may exercise its control over foreign commerce to retaliate upon an unfriendly nation, or injure an enemy; to influence international negotiations, or to avoid being drawn into unnecessary quarrels. An embargo of foreign commerce may therefore be proper, for the federal government cannot be compelled to grant or to continue its authority and protection.

As to commerce among the states no such considerations arise.[5] Here the subject is presented solely as between the individual and

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[1] Williamson, Remarks on the New Plan of Government, *supra*.

[2] Message to Congress May 4, 1822. Speech of William H. Crawford in Senate, Feb. 11, 1811. Annals, 11th Cong., 3rd Sess., pl. 139.

[3] Prentice & Egan, Commerce Clause 41.

[4] Lord *v.* Steamship Co., 102 U. S. 541.

[5] As to difference in purpose see speech of William H. Crawford in Senate, Feb. 11, 1811, *supra*.

state and federal governments. It is not affected by international considerations, nor does the United States in these relations take the place of or represent a state or state laws.

The distinction has been recognized in the administration of government from the very beginning. It has been understood that to make its exclusions effective Congress could forbid or permit foreign commerce and license the coasting trade, but that with these exceptions, transportation across state lines was conducted under state laws, and was an operation which the federal government could neither permit nor forbid. In 1852, when it was sought to extend the coasting laws to ferry boats operating across the Mississippi River between Missouri and Illinois, the court said:

"A license from the United States, and a license from a State cannot both be necessary to do the same thing. . . . A license conveys the right to do the thing or it conveys no right; if it conveys the right to do the thing, then no other or further conveyance from any person can be necessary. A license from the United States to carry on the coasting trade, it is urged, is necessary for a steam ferry-boat. If this be so, then a license from a State would be of no avail, and need not be obtained. The States have exercised the right to license and regulate ferries from the commencement of the government to this day." [1]

The doctrine of this case was approved in 1861, by the Supreme Court,[2] and has not been questioned.

It is therefore well established that a federal license is not required for the conduct of an interstate ferry not engaged in coastwise navigation, and that the possession of such a license does not authorize a vessel to engage in such ferriage in violation of State law.[3]

In this respect the rule applicable to ferries was in no way exceptional. A ferry is a public highway, — "a continuation of a road," and the rule applied to it was the one applicable to all other carriers. The important fact is that all transportation, when considered as a business in itself and in relation to the carrier, except foreign commerce and the coasting trade, was within state control and beyond federal jurisdiction.[4]

Federal powers over interstate commerce being then small in

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[1] The Steam Ferry Boat, William Pope, 1 Newb. Adm. 256.

[2] Conway *v.* Taylor's Executor, 1 Black (U. S.) 603.

[3] Newport *v.* Taylor, 16 B. Mon. (Ky.) 699; Chilvers *v.* People, 11 Mich. 43; Midland Ferry Co. *v.* Wilson, 28 N. J. Eq. 537; Carroll *v.* Campbell, 108 Mo. 550.

[4] Chief Justice Marshall on Federal Regulation of Interstate Carriers, 5 Col. L. Rev. 77.

extent, very few restrictions were needed. Congress had been given authority to raise revenue by a tariff on foreign commerce. This power was restricted by the rule of uniformity and by the provision that no tax or duty should be laid on articles exported from any state. Congress was given a limited authority over coasting navigation, but had no control over communication by land, or by interior waters. Its power over navigation was restricted by the provisions that no preference should be given to ports of one state over those of another, and that vessels bound to or from one state should not be obliged to enter, clear, or pay duties in another.

Aside from this, the federal power over commerce, Edmund Randolph said,

"extends to little more than to establish the forms of commercial intercourse between the States and to keep the prohibitions which the Constitution imposes upon that intercourse undiminished in their operation; that is, to prevent taxes on imports or exports, preferences to one port over another by any regulation of commerce or revenue; and duties upon entering or clearing of the vessels of one State in the ports of another." [1]

So far as concerns commerce among the states, therefore, the rule of the Constitution was free ships, free goods, and, except in the foreign and coasting trade, non-interference with carriers. From these small beginnings the present federal power has developed.

In Gibbons *v.* Ogden,[2] a case which concerned only the federal power over navigation, the power was declared to be exclusive. In Brown *v.* Maryland [3] it was held that a state tax upon the sale of imported goods by the importer in original packages was prohibited not only by the express provisions of the Constitution, but also by the commerce clause.

It is sometimes said that the doctrine commonly called the "original package" rule was first declared in Brown *v.* Maryland.[4] This is a mistake.[5] That which was new about this decision was

[1] Opinion on United States Bank bill, Feb. 12, 1791; see Federalist No. 42.

[2] 9 Wheat. (U. S.) 1. [3] 12 Wheat. (U. S.) 445.

[4] See Judson, Interstate Commerce 24, 25.

[5] The rule was a familiar one when the case was decided. It may be traced to state statutes adopted under the Articles of Confederation: see, for example, Act of N. Y., March 22, 1784, Laws 1777–1784, c. 10, p. 599; Act of April 11, 1787, Laws 1788–1789, c. 81, p. 509. Until 1822 the exemption which was established by the decision in this case had been recognized in the Maryland statutes, Freund, Police Power § 81, and the same exemption existed under the statutes of Pennsylvania until 1824; see Act of April 2, 1821, and supplement of March 4, 1824. Biddle *v.* Comm., 13 S. & R. (Pa.) 405.

not in the announcement of the original package rule, but in the extension of the meaning of the commerce clause. Aside from the prohibition upon taxation of imports and exports, the Constitution, as understood when framed and adopted, imposed no limitations upon the taxing powers of the states.

"The inference from the whole is, that the individual States would, under the proposed Constitution, retain an independent and uncontrollable authority to raise revenue to any extent of which they may stand in need, by every kind of taxation, except duties on imports and exports." [1]

The great importance of Brown *v.* Maryland is that by that decision this construction was definitely disapproved. The holding of the case is in substance that the federal power derived from the commerce clause, being an exclusive power, and including, as Randolph had said, power "to prevent taxes on imports or exports," amounted in effect to an original limitation upon state powers.

The new theory of construction, when adopted, may have seemed of small importance, for the tax then in question was in any event unconstitutional. In the case of the State Freight Tax,[2] however, its real importance began to appear. The tax there involved was imposed by a state upon every ton of freight carried within its limits. Such a tax, the state authorities considered, was not strictly a tax upon imports or exports. On the other hand, the burden which it imposed upon commercial intercourse among the states was as substantial as it would have been had it fallen within the precise terms of the constitutional prohibition. The Court said:

"It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or leave the State upon one of those railroads or canals, such a regulation would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one in hand." [3]

The tax was held invalid because prohibited by the commerce clause. The Court had, but a short time before this decision, held that the words "exports" and "imports" as used in the Constitution refer only to foreign trade.[4] The clause which was intended

[1] Federalist Nos. 33, 32.
[2] 15 Wall. (U. S.) 232.
[3] 15 Wall. (U. S.) 276.
[4] Woodruff *v.* Parham, 8 Wall. (U. S.) 123.

to forbid state taxation of interstate as well as foreign trade having thus been so narrowed as to fail of its full purpose, the commerce clause was broadened to take its place, and thus construed was applied so as to operate upon interstate carriers not engaged in the coasting trade.

The rule being established, then, that the states may not tax transportation, the next step was taken in the restriction of state power to regulate freights and fares for interstate transportation, — a jurisdiction which the states had exercised from the earliest times, which the Supreme Court had but few years before declared to be "unrestricted and uncontrolled"[1] and whose exercise had been sustained without question in 1876.[2] This doctrine was not abandoned hastily, but because, in the language of Mr. Justice Miller, "it is impossible to see any distinction in its effect upon commerce between a statute which regulates the charges for transportation, and a statute which levies a tax for the benefit of the State upon the same transportation."[3]

The states being thus deprived of the power to regulate interstate rates, the doctrine has now become current that the Constitution gave this power to Congress. Of course the argument by which the limitation of state jurisdiction was achieved, if good at all, should equally be good as a limitation upon federal power. Congress is forbidden to tax exports from any state; clearly, then, under the rule applied in the case of the State Freight Tax, like the states, it cannot tax transportation from one state to another, and as, in the phrase employed by Mr. Justice Miller in the case of the Wabash Railway, it is impossible to see a distinction in its effect upon commerce between taxation and regulation of rates, therefore the conclusion should have been that Congress is constitutionally unable to regulate interstate rates.

The argument was used, however, only against the states. So far as concerns federal power quite a different argument is used. Congress, it is said, is not expressly given this power, neither is the power expressly denied, and as it no longer exists in the states, it must, so it is said, belong to Congress, — a strange inversion of the principle still taught in the schools for construction of state and federal constitutions.

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[1] Railroad Company *v.* Maryland, 21 Wall. (U. S.) 456, 471.

[2] Peik *v.* Chicago, etc., R. Co., 94 U. S. 164.

[3] Wabash Railroad Co. *v.* Illinois, 118 U. S. 557, 570; reversing People *v.* Wabash Railroad Co., 104 Ill. 476.

Upon this argument, and upon no other, is based the present claim of federal jurisdiction to regulate freight rates. The power being, then, entirely beyond the design of the Constitution, it is not surprising that its exercise should, as has been shown by Mr. Olney[1] and Mr. Morawetz,[2] be embarrassed by extraordinary constitutional difficulties.

Federal power has also been extended in other directions so as to prevent state legislation, which would interfere with or burden interstate transportation or trade or obstruct navigation of public waters. The important feature about this history is that the power which was originally given to Congress in order to secure "an unrestrained intercourse between the States"[3] has developed under the decisions of the Supreme Court subject to the influence of this constitutional purpose only and with no other end in view. The states have been deprived of power to interfere with the freedom of interstate communication, while on the other hand the power has not been acquired by Congress.

It is still true, as Professor Tucker said, that "the whole Constitution in all of its parts looks to the security of free trade in persons and goods between the States of the Union, and by this clause prohibits either Congress or the States to interfere with this freedom of intercourse and trade."[4]

The federal power, then, has not developed so as to authorize such legislation over corporations as has lately been proposed, and the nature of the jurisdiction which Congress has acquired over the avenues of interstate trade, does not, in any proper view of the Constitution, authorize it to close those avenues to any person. Further than this: the Constitution contains two express limitations upon Congress which prevent its assumption of these powers.

(1) *The Liberty to engage in Commerce.*

The Fourth Article of the Constitution provides that

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."

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[1] "Legal Aspects of Congressional Railroad Rate-Making," North Amer. Rev., October, 1905.

[2] "The Power of Congress to Regulate Railway Rates," 18 HARV. L. REV. 572. See also article by Mr. Blackburn Esterline, "Regulation of Railway Rates by Congress is Impracticable," 39 Am. Law Rev. 517.

[3] Federalist, No. 11.

[4] Tucker, Constitution § 256.

The Fifth Amendment, that

"No person shall . . . be deprived of life, liberty or property, without due process of law."

The Fourteenth Amendment protects the liberty of every person against invasion by state authority. When legislation is proposed which would forbid any person or class of persons to follow ordinary pursuits freely permitted to others, these constitutional provisions must be considered.

It is the singular good fortune of the Constitution that it was founded during that short period when political ideas were those of the completest individual liberty, — "while the jealousy of power was strong and the love of liberty and of right was ardent."[1] "If we examine the present state of the world," James Winthrop said, "we shall find that most of the business is done in the freest states, and that industry decreases in proportion to the rigour of government."[2] This was not the spirit of the old régime, when industry was a privilege acquired by license from government or by the election of a guild,[3] and it may not be the spirit of the new régime, under which organizations not unlike the guilds have arisen, and the revival of governmental license is proposed. Industrial liberty for the modern world was the discovery of the seventeenth and eighteenth centuries, and its security, with all other rights, which together constitute freedom, was the great purpose of American governments.

To this end provisions were inserted in state constitutions, declaring and protecting the inalienable rights of man. No such provisions were inserted in the Federal Constitution, for there they were unnecessary. The liberty of the citizen was protected by the state, not by the United States. This, said Alexander Contee Hanson,[4] results from the nature of a federal republic, which "consists of an assemblage of distinct states, each completely organized for the protection of its own citizens." The rights of private citizens, James Bowdoin said, are not "the object or subject of the Constitution."[5]

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[1] Ruffin, C. J., in Hoke *v.* Henderson, 4 Dev. (N. C.) 33 (1833).

[2] Letter of James Winthrop (Agrippa) in Massachusetts Gazette, Nov. 23, 1787; Ford, Essays on the Constitution 53, 55.

[3] Lecky, Democracy and Liberty, Vol. II. p. 243. See remarks of Senator Hayne of South Carolina, April 30, 1824. Annals, 18th Cong., 1st Sess., Vol. I. p. 623.

[4] "Remarks" published in Ford, Pamphlets on the Constitution 221, 241–243.

[5] 2 Elliot Deb. 87.

The states, then, it was answered, should accept the Constitution upon the express condition that nothing therein deprive a citizen of the rights given to him by the state in which he resides [1] or the Constitution should be amended so as to protect every individual in the enjoyment of rights derived from the states. Such conditional acceptance or amendment was unnecessary, but to satisfy doubts, not to alter the operation of the Constitution [2] the amendments known as the Bill of Rights were proposed in 1789 and soon after adopted.

By these amendments the provision of the Constitution giving to citizens of each state all the privileges and immunities of citizens of the several states [3] was supplemented by a long list of rights not to be infringed, including provisions, not restricted to the protection of citizens, which enact that no person — that is, as the word is construed, no citizen, alien or corporation — shall be deprived of life, liberty, or property without due process of law; that private property shall not be taken for public use without just compensation; [4] and that the enumeration of certain rights shall not be construed to deny or disparage others retained by the states or by the people.[5]

What are the privileges, immunities, liberties, and rights of property thus protected? For these expressions, which have a long history in English law, attempts have been made to establish a somewhat technical meaning which would so restrict their operation as only to forbid arbitrary executions, imprisonments, and forfeitures.[6] This view comes from a partial consideration of the subject. English history and the development of English law centre about the growth of individual liberty. To give to the provisions in the American Constitution which protect individual rights the meaning which they would have had for Norman

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[1] See letter by James Winthrop in Massachusetts Gazette, Feb. 5, 1788; Ford, Essays on the Constitution 119.

[2] The preamble adopted with these amendments by Congress reads: "The conventions of a number of the States having at the time of adopting the Constitution expressed a desire, in order to prevent misconstruction and abuse of its powers, that further declaratory and restrictive clauses be added; and as extending the grounds of public confidence in the government will best ensure the beneficent ends of its institution, resolved," etc. See Mr. William D. Guthrie, "Constitutionality of the Anti-Trust Act," 11 HARV. L. REV. 80, 83.

[3] Article IV. § 2.

[4] Fifth Amendment.

[5] Ninth Amendment.

[6] "The Meaning of the Word Liberty," 4 HARV. L. REV. 365.

lawyers or for lawyers of the English monarchy, is wholly to misinterpret the purposes of the instrument.

There are, however, authorities which hold that even in early law the word "liberty" referred not merely to freedom from arbitrary imprisonment, but included also industrial liberty so far as it existed. "In a sense all the rights secured by Magna Carta were 'liberties,' but the word is probably used here as an equivalent to 'franchises' embracing feudal jurisdictions, immunities and privileges of various sorts, all treated by medieval law as falling within the category of property." [1] "These words have always been taken to extend to freedom of trade." [2] From this beginning the growth of civil, religious, and political rights may in part be traced, but liberty comes in part only from England. The American declarations of rights, Professor Jellinek says, "enumerate a much larger number of rights than English declarations, and look upon these rights as innate and inalienable. Whence comes this conception in American law? It is not from the English law." [3] Partly, perhaps, consciously or unconsciously, these new rights and new ideas are results of life in the new world. Conditions in America, where every settler had to rely upon himself for safety as well as sustenance, where relations to others were comparatively slight and to government hardly felt, made individual liberty of the widest character a fact of daily experience. Industry as a privilege or as less than an inalienable right would have been a difficult conception to introduce. Moreover, "the men who founded the American republics, state and federal, were not seeking to imitate Great Britain. They set out to establish institutions such as they thought England ought to have, and not those which they found existing." [4]

Much of the discussion of the formative period seems, as is often noticed, to be of French rather than English origin.[5] That there should have been such an influence seems natural. French and Americans had been allies, — their troops had served in the same armies, men of the two nations had closely associated at the time when the attention of the French nation was absorbed by political

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[1] McKechnie, Magna Carta 445.

[2] Parker, C. J., in Mitchel *v.* Reynolds, 1 P. Wms. 181 (1711).

[3] Jellinek, Rights of Man and of Citizens, Ch. VI.

[4] Campbell, The Puritan in Holland, England, and America, Vol. I. p. 53.

[5] Morley, Rousseau, Introduction; Borgeaud, Adoption and Amendment of Constitutions 19.

discussions, and above all by Rousseau.[1] American ideas were carried back to France by the troops who served here;[2] so that a declaration of the "rights of man" was known as "une idée américaine,"[3] introducing, in Lafayette's phrase, "the American era."[4] It would seem inevitable that the current French political discussion should be introduced into America, and that, at the close of the Revolution, many persons in this country, like Aaron Burr,[5] should be interested in French political theories, and for the same reason, — because introduced to this literature by French friends. It is one of the surprises of American history that the current of influence at this time seems to have flowed in one direction only. America influenced France, but it was not until later that France influenced America.[6]

It is quite possible, however, to trace the rise of the doctrines under whose influence the Constitution was formed, without recourse to France.

The Revolution was not a quarrel between two peoples, but between two parties, — the conservatives in England and America on one side, the liberals in both countries on the other side. In England the party of monarchy was successful. In the colonies

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[1] "We have never seen in our generation — indeed the world has not seen more than once or twice in all the course of history — a literature which has exercised such a prodigious influence over the minds of men, over every cast and shade of intellect as that which emanated from Rousseau between 1749 and 1762." Maine, Ancient Law 84. Hume, writing from Paris in 1756, said: "It is impossible to express or imagine the enthusiasm of the nation in his favor; . . . no person ever so much engaged their attention as Rousseau." Buckle, Hist. Civ. Eng. Vol. II. pp. 330, 331, notes 12, 13.

[2] Buckle, Hist. Civ. Eng. (N. Y. 1894) Vol. II. p. 417, note 211.

[3] Dumont, Souvenirs sur Mirabeau 97.

[4] "L'ère de la révolution américaine qu'on peut regarder comme le commencement d'un nouvel ordre social pour le monde entier, est à proprement parler l'ère des déclarations des droits . . . Ce n'est donc qu'apres le commencement de l'ère américaine, qu'il a été question de définer indépendamment de tout ordre pre-existant, les droits que la nature a départis à chaque homme, droits tellement inherens a son existence, que le société entière n'a pas le droit de l'on priver." Lafayette, Memoirs, Correspondances, et Manuscrits (Bruxelles, 1837), Vol. II. p. 45. Jellinek, "Rights of Man and of Citizens." See the recent discussion of this subject in France, "La Declaration des Droits de l'Homme et du Citoyen," Emile Walch (Paris, 1903, Henri Jouve); "Montesquieu et J. J. Rousseau" by J. Tschernoff (Paris, 1903, Librairie Marescq Ainé); Boutmy, article in Annales de l'ecole libre des sciences politiques, 1902, p. 414.

[5] Parton, Life of Burr, 1st ed., 132.

[6] "Rousseau in Philadelphia," by Lewis Rosenthal, 12 Mag. Am. Hist. 46; Merriam, American Political Theories; Borgeaud, Adoption and Amendment of Constitutions; Lee, Letter of a Federal Farmer; Ford, Pamphlets on the Constitution 290.

democratic institutions were established, and it was for the preservation of these institutions that the war was fought.[1]

The political doctrines of America were the doctrines of the Parliamentary party in England, Puritan in character, partly of Calvinistic origin and to this extent like much of Rousseau's speculation, derived from the democracy of Geneva. "The first indications of these religious-political ideas can be traced far back for they were not created by the Reformation. But the practice which developed," in America, "on the basis of these ideas was something unique. For the first time in history social compacts, by which states are founded, were not merely demanded, they were actually concluded."[2]

Instances of this influence are found in the efforts of Cromwell's army to establish by popular vote an instrument of government superior to the authority of Parliament; and in the statutes adopted in the early days of Rhode Island and Connecticut by general vote of the colonists. The idea from which this practice grew, Borgeaud says, was that to establish government, as to found a congregation, the consent of all concerned was necessary. "When the democratic communities of New England became veritable States, the Puritan conception, taken up and systematized by philosophy, had become the theory of the social contract. Under this new form it presided over the formation and establishment of American constitutions of the Revolutionary period, constitutions whose most perfect expression was that adopted by Massachusetts in 1780. It was by virtue of the formula which Jean Jacques Rousseau has rendered famous, but which the Anglo-Saxons had not learned from him, that this constitution was submitted to all the citizens of the State."[3]

The political writers who had the greatest influence in forming American opinion, and whose works were most quoted in this country, were Locke and Algernon Sidney. The principles upon which the American Revolution was conducted came largely from them,[4] and their influence in the constitutional period is strongly marked.

Both of these writers had defined liberty and property as including the right of industry. Locke said:

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[1] "The Revolution Impending," by Mellen Chamberlain, in Narrative and Critical History of America, Vol. VI. pp. 1, 2.

[2] Jellinek, Rights of Man 61, 62.

[3] Borgeaud, Adoption and Amendment of Constitutions 138.

[4] Fiske, Critical Period 64.

"Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person.' This nobody has any right to but himself. The 'labour' of his body and the 'work' of his hands are properly his."[1]

So Algernon Sidney:

"Property also is an appendage to liberty; and 't is as impossible for a man to have a right to lands or goods, if he has no liberty, and enjoys his life only at the pleasure of another, as it is to enjoy either, when he is deprived of them."[2]

The American governments were formed when the influence of this philosophy was at its height. James Iredell, afterward Associate Justice of the Supreme Court, said in the Convention of North Carolina that he believed the passion for liberty was stronger in America than in any other country in the world.[3] The legislative proceedings of the time justify these statements. "We hold these truths to be self-evident, that all men were created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." Of these statements in the Declaration, the Supreme Court has said that while they "may not have the force of organic law, or be made the basis of judicial decision as to the limits of rights and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit; and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."[4]

In state constitutions the doctrines of individual freedom were still more fully declared. The Bill of Rights of Virginia, in 1776, was adopted to secure

"the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."

New Hampshire in 1784 and again in 1792 prefaced its Constitution with the statements that

"All men have certain natural, essential and inherent rights; among which are the enjoying and defending life and liberty, acquiring, possess-

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[1] Second Treatise on Government, Ch. V. § 27.

[2] Discourses on Government, Ch. III. § 16; see too Adam Smith, Wealth of Nations, Bk. I. Ch. X. Part II.; Thiers, De la Propriété 36, 37.

[3] 4 Elliot Deb. 95.

[4] Gulf, etc., Ry. Co. *v.* Ellis, 165 U. S. 150, 159–160.

ing and protecting property, — and in a word of seeking and obtaining happiness."

Similar expressions are in the constitutions of most of the other states. The Constitution of Missouri some years afterward, instead of referring generally to the right of acquiring and possessing property, includes among the inalienable rights of individuals "life, liberty, the enjoyment of the fruits of their own labor and the pursuit of happiness," a phrase which was modified so as to protect individuals in "the enjoyment of the gains of their own industry." Upon this subject the Constitution of Kentucky still later, in words which recall Lafayette's expressions,[1] said that "absolute power over the lives, liberty and property of persons exists nowhere in a republic, not even in the largest majority."

In all these broad phrases law-makers used, not the language of Norman law, but spoke, as Fisher Ames said of the Federal Constitution, in "the language of philosophy."[2]

The purpose to secure individual liberty — a controlling purpose of the communities which framed and adopted the Constitution — inheres, then, not only in its preamble, but in the operating provisions by which this purpose was made effective. Among the most important of these provisions are those securing the right of industry. "The right to make contracts," William H. Crawford said, "is antecedent to and independent of all municipal law."[3] Early in the history of the government the federal courts held that the privileges and immunities of citizenship included "the right of citizens of one State to pass through, or reside in any other State, for the purposes of trade . . . or otherwise."[4] In Gibbons *v.* Ogden the Supreme Court, speaking by Mr. Chief Justice Marshall, held that the right of intercourse between state and state was not granted by the Federal Constitution, but "derives its source from those laws whose authority is acknowledged by civilized man throughout the world."[5]

That is, in other words, the right to engage in interstate commerce is part of the inalienable liberty which, according to the philosophy of that time, has a higher source than the Constitution

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[1] Memoirs, Correspondances et Manuscrits (Bruxelles, 1837), Vol. II. p. 45.

[2] 2 Elliot Deb. 155.

[3] Speech in Senate, Feb. 20, 1811; Annals, 11th Cong., 3d Sess., pl. 340.

[4] Corfield *v.* Coryell, 4 Wash. C. C. Rep. 371; Ward *v.* Maryland, 12 Wall. (U. S.) 418, 430.

[5] 9 Wheat. (U. S.) 1, 211.

itself, and whose protection is one of the chief purposes for which government is instituted. Political theories have changed since this decision, but the Constitution remains, and the rights which it was formed to protect still have its assurance.

Under the influence of slavery the meaning of the word "liberty" was much restricted. It proved to be true, for the white as for the black, that the Union could not remain half slave and half free. This narrowing influence is no longer felt, and again liberty is "the greatest of all rights,"[1] including all rights necessary for the maintenance and security of every person, and among others the right to engage in commerce. The Fourteenth Amendment then marks a return to the earlier constitutional views. It "conferred no new and additional rights, but only extended the protection of the Federal Constitution over rights of life, liberty and property that previously existed under all state constitutions."[2]

Under this amendment liberty "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned,"[3] and in so doing to move freely from state to state.[4] "The right to follow any of the common occupations of life is an inalienable right."[5]

The right to engage in commerce is, then, part of the liberty derived from the states which neither the United States[6] nor the states[7] may deny. There is no process of law by which the right may be taken. As the right is derived from state law,[8] it belongs

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[1] Jacobson *v.* Massachusetts, 25 Sup. Ct. Rep. 358, 361.

[2] Mobile & Ohio R. R. *v.* Tennessee, 153 U. S. 486, 506.

[3] Allgeyer *v.* Louisiana, 165 U. S. 578, 589; Pavesich *v.* New England Life Ins. Co. 50 S. E. Rep. 68; City of Chicago *v.* Netcher, 55 N. E. Rep. 707; Kellyville Coal Co. *v.* Harrier, 69 N. E. Rep. 927; Erdman *v.* Mitchell, 56 Atl. Rep. 327; State *v.* Dodge, 56 Atl. Rep. 983; State *v.* Ashbrook, 55 S. W. Rep. 627.

[4] Williams *v.* Fears, 179 U. S. 270.

[5] Opinion of Mr. Justice Bradley in Butchers' Union Co. *v.* Crescent City Co., 111 U. S. 746, approved in 165 U. S. 578, 589.

[6] Fifth Amendment.

[7] Fourteenth Amendment.

[8] Gibbons *v.* Ogden, 9 Wheat. (U. S.) 1; Bowman *v.* Railroad Co., 115 U. S. 611; "Origin of the Right to Engage in Interstate Commerce," 17 HARV. L. REV. 20.

to those to whom the state gives it, whether citizen, alien, or corporation. The protection of the Fifth and Fourteenth Amendments belongs to all persons, and cannot be disregarded in respect to those artificial entities called corporations any more than in respect to the individuals who compose them.[1] The right to engage in commerce is a franchise which, being granted by another sovereign, is beyond federal jurisdiction either to prohibit or to tax.[2] In this matter the authority of the state is complete, and beyond federal control, — a distribution of power which results from the nature of a federal republic, "an assemblage of distinct States, each completely organized for the protection of its own citizens."[3]

The exercise of this constitutional right, derived from state law, to engage in commerce, is necessarily subject to two limitations. The first of these is, of course, the wide federal jurisdiction in foreign affairs already mentioned. The second limitation is in the power of police regulation, which belongs to Congress, and which has been exercised, for example, in the statutes forbidding transportation of articles which, by the commercial usage of nations, are not legitimate subjects of commerce. Congress, that is, has a discretionary power, within constitutional limits, so to regulate commerce as to accomplish the purposes for which the federal jurisdiction was created. Carriers may be required to give rest, water, and food to live stock; transportation of infected articles may be forbidden, and impediments to intercourse among the states may be removed. In all this legislation, however, there is no question of the person for or by whom commerce is conducted. The subject regulated is that portion of commerce given to Congress, and in the exercise of this power, as in the exercise of its other powers, Congress is subject to all the limitations imposed by the Constitution.[4] Congress cannot deprive any person of liberty, exclude proper articles from interstate transportation,[5] nor

[1] Gulf, Colorado, etc., Co. *v.* Ellis, 165 U. S. 150, 154; United States *v.* Northwestern Express Co, 164 U. S. 686, 689; Covington, etc., Co. *v.* Sandford, 164 U. S. 578, 592; Coffeyville Vitrified Brick Co. *v.* Perry, 76 Pac. Rep. 848; State *v.* Missouri Tie Co., 80 S. W. Rep. 933.

[2] Louisville, etc., Co. *v.* Kentucky, 188 U. S. 385; Pacific Railroad Cases, 127 U. S. 1, 40.

[3] A. C. Hanson, "Remarks" published in Ford, Pamphlets on the Constitution 221, 241–243.

[4] Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 336.

[5] *Ex parte* Jackson, 96 U. S. 727, 735; *In re* Rapier, 143 U. S. 110, 133; Speech of Wm. M. Evarts in Senate, Jan. 13, 1887, Cong. Rec., 49th Cong., 2d Sess., Vol. XVIII. Part I. p. 603.

distinguish between proper occupations by reason of the personality of shipper or consignee. Some rights in every free government are beyond control of the state. "A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism." [1]

The two powers, state and federal, must, in the language of Senator Wells, "keep company," and "every application of . . . power, by the United States, which has a tendency to embarrass or impair the free exercise of the power reserved to the States is unwarranted, and, if done . . . with a view to such a purpose, is the affair of arrogance and usurpation." [2]

(2) *Taxation of Imports and Exports.*

It has been stated that under the Constitution as originally formed, and for many years administered, Congress had no jurisdiction over transportation from state to state, save as conducted by coastwise navigation.[3] Interstate transportation was left to the states, Congress being forbidden to tax articles exported from any state, and the states forbidden to tax imports or exports. The restriction upon the states, Randolph said, Congress might keep "undiminished" in operation by legislation under the commerce clause, but beyond this, federal power did not extend. Congress being then without jurisdiction over carriage among the states, there was no need to provide that it should not tax or prohibit such transportation, for Congress had no power to which such a restriction could apply.

Federal power, then, never extended so far as to enable Congress to close interstate roads; but this defect of power is not all. Beside this, Congress is subject to the express provision forbidding taxation of exports, and this provision should not only prevent taxation of the goods carried, but should forbid taxation of interstate trans-

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[1] Loan Association *v.* Topeka, 20 Wall. (U. S.) 655, 662; Opinion of Justice Beck in Hanson *v.* Vernon, 27 Iowa 28, 73, approved in State *v.* Mayor, etc., of Des Moines, 103 Iowa 75.

[2] Senator Wm. H. Wells, of Delaware, April 1, 1816, Annals, 14th Cong., 1st Sess., Vol. I. p. 259.

[3] Chief Justice Marshall on Federal Regulation of Interstate Carriers, 5 Col. L. Rev. 77; Speech of J. W. Singleton, of Illinois, in House of Representatives, Feb. 4, 1881, Cong. Rec., 46th Cong., 3d Sess., Vol. XI. Part III. Appendix, 74-81.

portation,[1] and as applied to interstate commerce may well be held to prevent federal prohibition.

The rule of the Constitution was free ships and free goods. Congress was, indeed, permitted to tax imports from abroad. It was intended to raise a federal revenue under the Constitution from a tariff upon foreign commerce, but upon commerce among the states no tax could be laid. The Southern States were not interested in the carrying trade, but were vitally interested in preserving access to the markets of the world for their staple products. Their most important market was Europe, and foreign commerce was chiefly considered in the debates, but even then the South contemplated the time when Northern States would be an important market, and the reason for prohibiting federal taxation of exports was, said a member of the Convention, in order that the planter should "receive the true value of his product wherever it may be shipped."[2]

All this would probably be accepted without question, were it not for the opinion rendered by the Supreme Court in 1868 in the case of Woodruff *v.* Parham.[3] This case holds that a state may tax articles brought from other states while still in first hands and original packages. The rule is necessary. Under any other, as the Court said, a "merchant of Chicago who buys his goods in New York and sells at wholesale in the original packages, may have his millions employed for half a lifetime, and escape all State, county, and city taxes; for all that he is worth is invested in goods which he claims to be protected as imports from New York."

It would have been sufficient answer to such a claim had the Court applied to this clause the interpretation which is now placed upon the commerce clause in cases involving state taxation, and held that goods can claim no preference from equal burdens by reason of foreign origin or because brought from another state. Adapting the language used in another connection,[4] it may be said that a provision forbidding taxation of articles brought from other states or countries "does not require that any bounty be given therefor." The Court, however, went further than this and held that the words "imports" and "exports" applied only to foreign

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[1] State Freight Tax Case, 15 Wall. (U. S.) 232.

[2] Williamson in State Gazette of North Carolina. Ford, Essays on the Constitution 393.

[3] 8 Wall. (U. S.) 123.

[4] Cornell *v.* Coyne, 192 U. S. 426.

trade, a rule which has been followed in later cases.[1] "It is not too much to say," Mr. Justice Miller remarked in delivering the opinion of the Court, and referring to the debates of the constitutional period, "that so far as our research has extended, neither the word export, import, nor impost is to be found in the discussions on this subject, as they have come down to us from that time, in reference to any other than foreign commerce, without some special form of words to show that foreign commerce is not meant."[2]

This decision, from which Mr. Justice Nelson dissented, completely reversed the rule which up to that time had generally been accepted. Mr. Chief Justice Marshall[3] and Mr. Justice Story[4] had both understood the words to include foreign and interstate commerce alike, and the Supreme Court itself, in a decision rendered by Mr. Chief Justice Taney, had so applied them.[5] In some respects time and experience of the workings of the Constitution give later generations better opportunities for practical understanding of that instrument than were open to its framers, but it is not likely that in 1868 the language of the Constitution could better be understood than in earlier times. The definitions given by Mr. Justice Miller, therefore, have not generally been accepted as convincing.

"Before the adoption of the Constitution, and therefore at the time it was framed, and its phraseology discussed, an article brought from Pennsylvania to North Carolina would have been said to be imported into North Carolina, and a tax on it would have been called an 'import tax.' It is difficult to say by what other name such a tax, if it could be laid, would now be styled."[6] Members of the Supreme Court have expressed the same view. Mr. Chief Justice Fuller, in a dissenting opinion in which Justices Brewer, Shiras, and Peckham agreed, said that although this provision of the constitution had been restricted in application to exports to a foreign country "it was plainly intended to apply

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[1] Hinson *v.* Lott, 8 Wall. (U. S.) 148; Brown *v.* Houston, 114 U. S. 622; Pittsburg Coal Co. *v.* State, 156 U. S. 590; Fairbank *v.* United States, 181 U. S. 283; Preston *v.* Finley, 72 Fed. Rep. 850; State *v.* Pittsburg, etc., Coal Co., 41 La. Ann. 465; *Ex parte* Martin, 7 Nev. 140.

[2] Woodruff *v.* Parham, 8 Wall. (U. S.) 123, 136.

[3] Brown *v.* Maryland, 12 Wheat. (U. S.) 445.

[4] Commentaries on the Constitution § 1016.

[5] Almy *v.* California, 24 How. (U. S.) 169.

[6] American Fertilizing Co. *v.* Board of Agriculture, 43 Fed. Rep. 609, 612.

to interstate exportation as well."[1] Notwithstanding these dissenting views, the decisions[2] indicate that the rule which in Woodruff *v.* Parham was applied to the clause forbidding the states to tax exports and imports, may also be applied to the clause forbidding Congress to tax exports from any state, although this clause is so worded as apparently to exclude such construction. In view of these dissensions the wording of the provision deserves attention.

When a governmental power over imports and exports is discussed, the words naturally refer to the territorial boundaries of the government whose powers are considered. Thus the New York statutes speak of articles manufactured in the city of Hudson "or imported or brought into the said City from any place whatsoever,"[3] and similar references are made to importations into the city of Albany,[4] to exportations from Albany, Saratoga, or Rensselaer counties to points south of Albany,[5] and to exports from Suffolk, Kings, and Queens counties.[6] In all these cases the words imports and exports relate to county and municipal boundaries. The English statutes speak of exportations from a particular port, and as so used the word refers to all goods taken out of that port, including those carried in the conduct of the coasting trade to other ports in England.[7] To prohibit a state in general terms to tax imports or exports would therefore, in the natural meaning of the words, refer to the territorial boundaries of the power thus limited and would forbid taxing articles carried across state lines. A similar restriction upon the power of the federal government would forbid taxing articles carried across national lines. If it were sought to extend this prohibition so as to prevent federal taxation of articles carried across state lines, the wording of the prohibition should be made with specific reference to the boundaries, not of the federal government, but of the states. This in fact is the form of the constitutional limitation upon federal power.

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[1] Champion *v.* Ames, 188 U. S. 321.

[2] Turpin *v.* Burgess, 117 U. S. 504; Dooley *v.* United States, 183 U. S. 151, 154; Cornell *v.* Coyne, 192 U. S. 418, 427; American Steel & Wire Co. *v.* Speed, 192 U. S. 500.

[3] Act of January 26, 1793, Laws 1789–1796, c. 22, p. 414.

[4] Act of April 3, 1790, *ibid.* c. 47, p. 175.

[5] Act of April 3, 1797, Laws 1797–1800, c. 94, p. 128.

[6] Act of April 4, 1800, Laws 1797–1800, p. 447.

[7] Muller *v.* Baldwin, L. R. 9 Q. B. 457; Barrett *v.* Stockton, etc., R. Co., 2 M. & G. 163; 3 M. & G. 956; 11 Cl. & F. 590.

The states are forbidden in general terms to lay any tax or duty upon imports or exports, while upon the powers of the federal government the limitation is made with express reference to state boundaries. No tax or duty, it is said, shall be laid by Congress "upon articles exported from any State." Here, then, the Constitution in fact used just such a special form of words as the Court in Woodruff *v.* Parham considered appropriate to designate commerce among the states.

Verbal criticism apart, however, it appears that in the common use of the terms, so far as concerned jurisdiction over goods carried across state lines, each state at the time of the formation of the Constitution was foreign to every other.[1] All commerce, then, except that which was entirely within each state, was foreign commerce. In Massachusetts, for example, where several statutes required inspection of lumber shipped "for exportation to foreign markets" or "exported beyond sea," it was enacted on March 16, 1784, that this term "shall be considered and understood to extend to any port or place not within this Commonwealth." This statute does not purport to amend the acts to which it refers, nor to alter their application, but solely to define the terms employed. The word "foreign" was capable of different meanings, of which Massachusetts adopted the broadest. Under this construction even the rule of Woodruff *v.* Parham would apply the constitutional restrictions upon state and federal power to interstate as well as to international commerce. In general, the words "imports" and "exports" when used without express restriction appear in Massachusetts to have included all trade crossing the state line.[2]

That the Massachusetts rule prevailed also in other states is shown by the construction placed upon the Pennsylvania statute of 1759 for the inspection of lumber.

This statute, after reciting that "the reputation of this province hath been much advanced by the care of the legislature to prevent frauds and abuses in divers commodities of our country produce exported to foreign markets," proceeds to enact among other things "that no merchant . . . shall . . . take or put on board any ship or vessel for exportation out of this province, any staves,

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[1] Commonwealth *v.* King, 1 Whart. (Pa.) 448.

[2] Act of July 11, 1783, Perpetual Laws, Vol. I. p. 103; Act of March 31, 1788, *ibid.* p. 415; Act of February 26, 1794, *ibid.* Vol. II. p. 336; Act of February 27, 1795, *ibid.* p. 272.

heading, boards, planks, or lumber" before inspection thereof as provided by the statute.

In Shuster *v.* Ash,[1] decided by the Supreme Court of Pennsylvania in 1824, it was held that this statute, although enacted in avowed contemplation of "foreign markets," applied to a shipment of staves from Philadelphia to Wilmington. The Court said:

"It cannot be denied that the case falls within the words of the law, because, although the proprietaries of Pennsylvania were also proprietaries of the three lower counties of New Castle, Kent and Sussex on the Delaware, and both were under the same governor, yet the legislatures of the province and counties were in the year 1759 totally independent of each other, and so continued until the revolution in 1776, when each became a sovereign independent State. But it is contended, that the intent of the act is explained by the preamble, which is confined to an exportation to *foreign markets*. If the question had rested on the expression *foreign markets*, the defendant would have had much to say for himself, though even then it would not have been far from difficulty. A country governed by the same king would not, strictly speaking, be a *foreign country*. And yet without doubt an exportation to the British West India Islands must have been considered as within the provision of the act, because the principal markets for staves, &c., were in those islands, and yet they were subject to the same king as Pennsylvania. Construing the word *foreign* with greater latitude, it might extend to all countries beyond sea, without considering whether subject to the same sovereign or not, and carrying its signification to its utmost extent, it might include all countries and governments, other than the province of Pennsylvania, wherever situate. The main intent of the act was to make Pennsylvania staves more valuable by keeping up their character in consequence of their quality. The same observation applies to all other articles, which by various laws were made subject to inspection, — such as bread and flour, beef and pork, butter and lard, bark, fish, flaxseed, &c. I have examined all these acts and they are expressed pretty much as the one now under consideration. They prohibit exportation *out of the province*, or (since the revolution) *out of the state*. The words *out of the province* are so plain, that they seem manifestly intended to define the limits beyond which all markets should be deemed *foreign* markets. Unless we adhere to the line prescribed by the act, (the boundary of the province) where are we to stop and what exceptions are we to make? New Jersey is as near to us as Delaware — and Maryland joins both Delaware and Pennsylvania. The counsel for the plaintiff says that none of the old thirteen colonies of Great Britain, which afterwards confederated

[1] 11 S. & R. 90.

and established their independence could be called foreign markets within the meaning of this act of assembly. Now see to what this would lead. Pennsylvania exported large quantities of flour, to the eastward and southward — to Massachusetts and the Carolinas. Was it not of great importance that the character of her staple should be kept up in those markets? And is it not of great importance still? The coasting trade is of immense value. . . .

"So that we shall find, upon reflection, that our ancestors knew what they were doing when they used the words *out of the province*, and this will appear more clearly when we advert to an act passed in the year 1721, 'For the well tanning and currying of leather,' &c. This act declares 'that it shall not be lawful for any person or persons to lade, ship, or carry in any ship or vessel . . . with intent to transport or convey the same to any place or places out of the province except such as may be carried to the province of New Jersey, and counties of New Castle, Kent and Sussex on Delaware' . . . &c. &c. This shows that the legislature considered New Jersey and the counties on Delaware as embraced by the expression out of the province and therefore it was that they expressly excepted them.

"The other colonies pursued in their inspection laws the same policy as Pennsylvania. Each took care of itself, and considered its neighbors *quo ad hoc* as *foreigners*. The counsel for plaintiff cited the laws of Connecticut with respect to beef and pork. And I have examined the act for the inspection of tobacco passed in Maryland in the year 1763. The words are these "all tobacco which shall be exported out of this province shall be . . . inspected."

This stringent rule which made all states foreign was perhaps not invariable. An exception is suggested by comparing three statutes passed by the state of New York in March, 1787.[1] These statutes are similar in form. The first, after reciting that "butter and hogs lard have become articles of great exportation from this State and it is necessary that the exportation thereof be regulated," makes provision for inspection of butter and lard to be "exported from this State." The second statute[2] provides for inspection of beef and pork. The third,[3] passed on the same day with the second, after reciting that "staves and heading have become articles of considerable exportation from this State, and it is necessary that great care be taken to preserve their reputation at foreign markets," enacts that "no staves or heading shall be exported out of this State to any foreign market, but such as shall be culled . . .", etc.

[1] Act of March 1, 1788, Laws 1785–1788, c. 53, p. 717.
[2] Act of March 7, 1788, *ibid.* c. 55, p. 719.
[3] *Ibid.* c. 56, p. 723.

The difference in the wording of statutes otherwise so much alike appears to indicate that the word "foreign" in this instance was employed to prevent the application of the general terms in the statute to commerce with other states. That the words when used in the New York statutes without such limitation would apply to interstate trade is shown by the Act of March 22, 1784,[1] imposing duties in general terms "on the importation of certain wares and merchandise," but excepting the product "of the United States or any of them." Similar provisions exist in other statutes,[2] and unless limited the words ordinarily applied to all imports and exports, — foreign or interstate.[3]

In Connecticut a duty of two pence was imposed "for every gallon of rum imported" into the state. That this general law applied to interstate trade is shown by the fact that an allowance was made for wastage in transit which was fixed at "five per cent. for rum imported directly from the West Indies, and two per cent. for rum imported from the neighboring states."[4] This law was subsequently amended so that no duty was payable on rum not sold in the state, "provided, nevertheless, that nothing in this Act shall be construed to exempt rum exported out of this State northward by way of Connecticut River," etc.[5] In other words, Connecticut taxed the traffic of Western Massachusetts, Vermont, and New Hampshire, but did not intend to drive from its ports commerce on its way to New York and Rhode Island.

The same meaning of the words "exports" and "imports" appears in many other statutes, of which but a few need be cited.[6]

The constitutional provision must then have been intended, as was said by Mr. Justice McLean, to prohibit federal taxation of interstate commerce. "A revenue to the general government could never have been contemplated, from any regulation of commerce among the several States. Countervailing duties under the

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[1] Laws 1777–1784, c. 10, p. 599.

[2] Act of April 11, 1787, Laws 1785–1788, c. 81, p. 509; Act of March 12, 1788, *ibid.* c. 72, p. 786.

[3] Act of March 16, 1785, Laws 1785–1788, c. 35, p. 66; Act of May 4, 1786, *ibid.* c. 61, p. 320; Act of April 2, 1799, Laws 1797–1800, p. 439.

[4] Laws 1786, p. 210.

[5] *Ibid.* p. 326.

[6] *Connecticut*, Laws 1786, p. 245; Laws 1796, p. 321. *New Hampshire*, Act of June 21, 1785; Laws 1792, p. 313; Act of Dec. 28, 1791; Laws 1797, p. 381. *Virginia*, Act of Dec. 26, 1792; Laws 1803, pp. 241–242, § 3; Act of Dec. 28, 1795; Laws 1803, p. 352; Act of Jan. 27, 1802; Laws 1803, p. 430. *South Carolina*, "Imposts" Act of Dec. 12, 1795.

Confederation were imposed by the different States to such an extent as to endanger the Confederacy. But this cannot be done under the Constitution by Congress, in whom the power to regulate commerce among the States is vested."[1]

(3) *The Purpose of Constitutional Construction.*

George Clinton said that in the course of a long life he had found government not to be strengthened by an assumption of doubtful powers. The proposed method of trust regulation is this and more, — an assumption of powers for which there is no precedent, in order to supersede state laws on the subject of state corporations, — a field in which Congress has no jurisdiction whatever.

The question is therefore presented of the purpose of constitutional interpretation. The Supreme Court has often held, in passing upon the validity of state laws, that the courts will look into the operation and effect of a statute to discern its purpose,[2] and that if laws purporting to be enacted in the exercise of powers belonging to the state have no real or substantial relation to the objects of those powers, it is the duty of the court so to adjudge and thereby give effect to the Constitution.[3] The same rule which tests the validity of state legislation determines also the validity of legislation by Congress.

"The propriety of a law in a constitutional light," Hamilton said, "must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which, indeed, cannot easily be imagined), the Federal legislature should attempt to vary the law of descent in any State, would it not be evident that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State? Suppose, again, that upon the pretence of an interference with its revenues, it should undertake to abrogate a land tax imposed by the authority of a State; would it not be equally evident that this was an invasion of that concurrent jurisdiction in respect to

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[1] McLean, J., in License Cases, 5 How. (U. S.) 504, 594; Taney, C. J., in Passenger Cases, 7 How. (U. S.) 479, 480; Woodbury, J., *ibid.* 549.

[2] Henderson *v.* Mayor, etc., of New York, 92 U. S. 259, 268; Railroad Co. *v.* Husen, 95 U. S. 472; Collins *v.* New Hampshire, 171 U. S. 30; Reid *v.* Colorado, 23 Sup. Ct. Rep. 92, 97; Compagnie Française *v.* State Board of Health, 22 Sup. Ct. Rep. 811.

[3] Mugler *v.* Kansas, 123 U. S. 623, 661; Minnesota *v.* Barber, 136 U. S. 313; Hennington *v.* Georgia, 163 U. S. 299, 303; Scott *v.* Donald, 165 U. S. 58.

this species of tax, which the Constitution plainly supposes to exist in the State governments?"[1]

To these illustrations many others may be added. Unless federal powers are limited to the effectuation of constitutional purposes, the authority to raise and support armies may be made a means of controlling municipal elections, and jurisdiction over navigable waters may control appointment or election to state offices, — in short, if Congress "may use a power granted for one purpose, for the accomplishment of another and very different purpose, it is easy to show that a constitution on parchment is worth nothing."[2] Yet this perversion of powers is the sole method presented to justify the proposed federal control of corporations.

There is no constitutional authority for this method of construction. "Should Congress," said Mr. Chief Justice Marshall, "under the pretext of exercising its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this Court to say that such an act was not the law of the land."[3] The federal government was given the powers necessary or proper to enable it to accomplish the purposes for which it was created. The fact that a power could be used both for constitutional and unconstitutional purposes was not a reason for withholding it from the federal government. "No power, of any kind or degree, can be given, but what may be abused; we have, therefore, only to consider whether any particular power is absolutely necessary. If it be, the power must be given, and we must run the risk of the abuse, considering our risk of this evil as one of the conditions of the imperfect state of human nature, where there is no good without the mixture of some evil."[4]

The framers of the Constitution, then, in every instance, granted powers "commensurate to the object" to be attained.[5]

That every power given should, as Algernon Sidney said, be employed "wholly for the accomplishment of the ends for which it was given"[6] is therefore the one essential principle which applies to every federal jurisdiction. Unless this principle be accepted

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[1] Federalist No. 33.

[2] Senator Hayne, April 30, 1824. Annals, 18th Cong., 1st Sess., Vol. I. pl. 648.

[3] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316; Hoke *v.* Henderson, 4 Dev. (N. C.) 12.

[4] Remarks of James Iredell in Convention of North Carolina, 4 Elliot Deb. 95.

[5] Edmund Randolph in Convention of Virginia, 3 Elliot Deb. 70.

[6] Discourses on Government, Ch. I. § 1.

"no power could be delegated nor could government of any sort subsist."[1] To those opponents of the Constitution who were not satisfied with this appeal to necessity and to the honesty of government and who insisted that Congress, being the judge of the necessity and propriety of its acts, might pass "any act which it may deem expedient for any . . . purpose," Hanson replied "that every judge in the union, whether of federal or state appointment . . . will have a right to reject any act handed to him as a law, which he may conceive repugnant to the constitution."[2]

Further security against the perversion of powers to unintended purposes could not be given. Should these principles of constitutional construction now be abandoned, should the Constitution be made as broad as the results which federal powers may accomplish, and then in turn these powers be extended to serve the needs of the new government thus created, it is obvious that the Constitution has ceased to exist.[3]

No such methods of construction have yet been sanctioned. It is still true, as Hamilton said, that "the propriety of a law in a constitutional sense, must always be determined by the nature of the power upon which it is founded."

It is clear, then, that the Constitutional Convention did not intend to give Congress power to tax or to prohibit commerce among the states, and that the nature of the power upon which it is sought to found such a jurisdiction fails to support it. As Mr. Chief Justice Fuller very forcibly remarked, "under the Articles of Confederation the States might have interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves, to the general government, it was undoubtedly in order to form a more perfect union by freeing such commerce from State discrimination, and not to transfer the power of restriction."[4]

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[1] James Bowdoin, Convention of Massachusetts, 2 Elliot Deb. 84–85.

[2] A. C. Hanson, "Remarks" in Ford, Pamphlets on the Constitution 217, 234.

[3] "Every implication of a grant (of power to Congress) is confined to such as are direct and both necessary and proper, in the usual and natural acceptance of the terms, else it leads to unlimited power. Every means becomes in its turn an end, and thus justifies the use of means still more remote, until absolute power is attained." Resolutions of Legislature of South Carolina; adopted Dec. 18, 1840; copied in Cong. Globe, 26th Cong., 2d Sess., p. 123, Jan. 25, 1841.

[4] Champion *v.* Ames, *supra.*